No. 94-157

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as Personal Representative of the Estate of Kenneth J. Howard,
Petitioner,

vs.

CRYSTAL CRUISES, INC.,
a California corporation,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Death on the High Seas Act (46 U.S.C. App. § 761 *et seq.*) be read to supplant the general maritime law under *Moragne v. States Marine Lines,* 398 U.S. 375 (1970) for actions of wrongful death arising from incidents occurring aboard a foreign flag vessel while at anchor in foreign territorial waters?

2. May a survivor's income be taken into account to reduce damages for wrongful death under DOHSA and other federal statutes, or alternatively, under the general maritime law?

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OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 41 F.3d 527 (1994), and is reproduced beginning at Appendix A-3. The unreported decision of the district court granting summary judgment on the applicability of the Death on the High Seas Act ("DOHSA") to this case is reprinted at Appendix A-12, and its decision after trial (as amended pursuant to Rule 59 [e]) is reprinted beginning at Appendix A-27.

JURISDICTION

The decision and judgment of the Court of Appeals affirming the decision of the district court was filed December 1, 1994. No petition for rehearing was filed. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

See Appendix A-1 - A-2 for the text of the Death on the High Seas Act, 46 U.S.C. App. §§ 761-767 (1992).

STATEMENT

Plaintiff and petitioner Vika L. Howard brought this action in admiralty in the United States District

Court for the Eastern District of California for the wrongful death of her husband, Kenneth Howard ("Howard"). Howard died at Sacramento, California in October 1990 of complications following a laceration to his Achilles tendon which occurred a month earlier while he was debarking the SS *Crystal Harmony* as it lay at anchor in the harbor of Zihuatanejo, in the territorial waters of Mexico. The *Crystal Harmony* is a passenger cruise ship of Bahamian registry. It is owned by a Bahamian corporation. On the date of Howard's fatal injury, it was chartered by defendant and respondent Crystal Cruises, Inc. ("Crystal"), a California corporation.

The district court granted Crystal's motion for summary judgment that the cause of action for wrongful death was governed by DOHSA, and not by the general maritime law under this Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). However, because DOHSA lacks a survival provision, it allowed the companion survival action of Howard's estate to proceed under the general maritime law. Following a bench trial, and motions by both parties under Rule 59 (e), the court

entered judgment against Crystal for $378,794.

Mrs. Howard took a timely appeal from the district court's judg.nent. She contended that the district court erred in applying DOHSA rather than the general maritime law to her wrongful death claim. She also claimed the district court had violated the collateral source rule in taking into account her own wage earnings in calculating Howard's personal consumption to be deducted from the wrongful death award to her, and in reducing the award for lost services to account for Howard's own consumption of those services.

The Ninth Circuit affirmed the decision of the District Court. It did not address petitioner's issues of statutory construction and the appropriate reach for DOHSA in light of its legislative history. Nor did it consider the difference between DOHSA as a remedy for specified cases and the general maritime law as the law of the forum when no other statute applies. Under its reading of DOHSA, the fact that the accident took place on a foreign vessel in foreign territorial waters was irrelevant, so long as the suit was between two Americans in

an American court (41 F.3d at 530).

With regard to the collateral source issue, the court interpreted DOHSA's "pecuniary loss" standard as allowing courts to consider, in reducing damages payable by the wrongdoer, alternative means of support available to a surviving spouse.

REASONS FOR GRANTING THE WRIT

A. DOHSA Should Not Apply to This Case.

Without considering its legislative history or scope, the Ninth Circuit decided that DOHSA should apply to a wrongful death occurring aboard a Bahamian-flag vessel in Mexican territorial waters, simply because the suit was between Americans. This case involves two points about DOHSA: (1) unlike the Jones Act (46 U.S.C. App. 688 [1992]), DOHSA was *not* conceived or enacted as a general law of the forum for cases in admiralty, so that it does not apply to foreign-flag vessels operating in foreign territorial waters; and (2) under its own language, DOHSA begins and ends with the high seas, so that it could not apply to a case arising in foreign territorial

waters in any event, unless perhaps the vessel involved was registered under the flag of the United States. The decision of the Court of Appeals should be reviewed because it errs on both of these points, which are central to the body of maritime law entrusted to this Court by the Constitution.

1. DOHSA Is Not a General Law of the Forum.

DOHSA was enacted in response to a perceived gap in the admiralty law left by this Court's decision in *The Harrisburg*, 119 U.S. 199 (1886). Following accidents such as the sinking of the *Titanic*, in which large numbers of Americans who perished in disasters at sea were left without a maritime remedy in federal courts, Congress passed the final version of DOHSA in 1920, after many years of wrangling about its form and scope. One difficulty which occupied Congress was its inability to enact legislation that would cover torts occurring on foreign flag vessels while on the high seas, or elsewhere outside of American waters.

The Senate Judiciary Committee eventually proposed, and Congress subsequently passed, a new Section

4 of DOHSA (now 46 U.S.C. App. § 764), which allowed any foreign law providing a remedy "upon the high seas" to furnish a basis for a suit to be maintained under the Act. This addition, as well as numerous observations in the course of the Act's passage, show that the remedy provided in 46 U.S.C. App. § 761 was never intended to be a general law of the forum, applicable to all cases of maritime jurisdiction no matter where arising.[1]

The decision of the Court of Appeals, however, transforms DOHSA into just such a remedy, applicable in an American court of admiralty "to an action filed by an American plaintiff against an American defendant" (41 F.3d at 530). In doing so, the appellate court has supplanted, if not overruled *sub silentio*, the general maritime law of the forum declared by this Court in *Moragne v.*

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[1]*Compare* DOHSA *with* the Jones Act, 46 U.S.C. App. § 688, which for seamen is unrestricted in its territorial application, and which is construed where appropriate to apply to claims brought in American courts for negligence occurring on foreign vessels at sea or in foreign ports. *Lauritzen v. Larsen*, 345 U.S. 571, 576-81 (1953); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-10 (1970).

States Marine Lines, 398 U.S. 375 (1970). After the decision by the Court of Appeals in this case, the remedy provided by *Moragne* no longer has any application to cases in admiralty "not covered by the Act" (*Moragne,* 398 U.S. at 402), because the Act has now been construed to apply to any suit between Americans, no matter where arising or occurring, so long as it is more than three nautical miles from the shores of the United States. (State wrongful death acts usually, but not necessarily, supplant the *Moragne* remedy for accidents arising in state territorial waters.)

If this Court grants the petition for certiorari in this case, petitioner will be prepared to show, from a thorough review of the enactment of DOHSA and its subsequent history in the courts, that the statute was not intended to cover torts in foreign waters aboard foreign flag vessels. When no other remedy applies, such cases should be left to the general maritime law.

2. DOHSA's Jurisdiction Begins and Ends with the High Seas.

As a matter of statutory construction, the term "high seas" as used in the text of § 761 should be given its plain meaning. The decision of the Ninth Circuit in this case, as well as a line of decisions in other federal courts, renders the term superfluous by focusing just on the phrase: "occurring . . . beyond a marine league from the shore of any State . . .". This has changed the Death on the High Seas Act into the Death Occurring Anywhere Outside of American Territorial Waters Act, a result never intended or contemplated by Congress.

When DOHSA was first proposed, its reach extended to "the high seas, the Great Lakes, or any navigable waters *of the United States,*" as well as to any accident aboard an American-flag vessel "in *whatsoever waters such vessel may have been* at the time of the injury."[2] Legisla-

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[2]Quoted, with emphasis added, from the text of the original bill as given in G. Whitelock, "A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts," 22 Harvard L. Rev. 403, 416 n. 3 (1908).

tors from the coastal states, however, objected to any preemption of their state wrongful death remedies. The language of the bill was later changed to ensure that the territorial reach of DOHSA would begin where State wrongful death jurisdiction ceased. This language (italicized in the quotation below) appears in § 761 as eventually enacted:

> That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States,* the personal representative of the decedent may maintain a suit for damages . . .

To construe DOHSA as meant to apply in foreign territorial waters is to reject this plain history of legislative intent, and to engage in judicial legislation.

B. In Subtracting from a Death Benefit the Income of a Surviving Spouse, the Ninth Circuit Has Ignored the Requirements of DOHSA and the Collateral Source Doctrine under Maritime Law.

This part of the Petition calls upon the Court to exercise its traditional oversight of federal statutory law, here the application of legal standards for the award of

death benefits under wrongful death statutes.[3] At stake is the ability of surviving spouses in federal wrongful death cases to recover their full pecuniary losses. Petitioner submits that the Ninth Circuit, by holding that "alternative means of support available to an adult beneficiary . . . in a DOHSA action may be taken into consideration by a court," 41 F.3d at 531, undermines the statutory language of DOHSA and the collateral source doctrine as applied in maritime cases generally.

1. Congress established the measure of recovery in DOHSA cases as "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . ." 42 U.S.C. App. § 762. The Court considered the pecuniary loss standard under DOHSA in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618

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[3]The issue raised in this part of the Petition implicates all those federal wrongful death statutes which have been construed to limit recovery to pecuniary damages for survivors. Among these statutes are (1) DOHSA; (2) the Jones Act, 46 U.S.C. App. § 688, as construed in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); (3) the Federal Employers' Liability Act, 45 U.S.C. § 51, as construed in *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913).

(1978), and held that when Congress, through the DOHSA statute, speaks to a particular issue, the courts are not free to "supplement" Congress' decision. *Id.* at 625. The Court further stated that "The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, . . . and damages." *Id.* Petitioner submits that the lower court erred by limiting the pecuniary losses recoverable as damages.

Petitioner does not dispute that courts must deduct the decedent's personal consumption from the survivor's recovery. The Ninth Circuit took this, however, one step further. In applying the consumption factor to "total household income," the lower court subtracted the decedent's personal consumption from the surviving spouse's independently-earned income. 41 F.3d 530-31. This additional step goes beyond the standard of pecuniary loss. As the Court noted in *Higginbotham*, "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a

different class of beneficiaries." *Id.* at 626. Petitioner submits that the lower court has prescribed a different measure of damages by looking to the total household income and not the pecuniary loss of the decedent's own wages and services.

2. In including the spouse's independent income in the damage calculation, petitioner contends that the Ninth Circuit considered a collateral source. *Anheuser-Busch Inc. v. Starley*, 28 Cal.2d 347, 349, 170 P.2d 448 (1946), stated the basic contours of the collateral source doctrine:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer.

Id. The lower court's decision undermines the doctrine because it reduces the award based on the personal consumption of a source of income independent of the wrongdoer. In effect, the lower court's decision indemnifies the tortfeasers when the victim's surviving spouse works. This result is contrary to the shared purpose of

the collateral source doctrine and federal wrongful death statutes — to protect the right of recovery of survivors.[4] Petitioner will be prepared to argue to this Court that when determining pecuniary losses in federal wrongful death cases, the courts should not deduct the decedent's personal consumption from the spouse's income.

Petitioner submits that this case presents a novel, but not unique, issue of federal law. Dual income households have become commonplace. Federal courts will increasingly face this issue of introduction of a spouse's

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[4]Neither this Court, nor any court below prior to this case, has ever applied the personal consumption of the decedent to the total household income in determining a proper award to the surviving spouse. Supporting its unique holding, the court below relies on 16 A.L.R. Fed. 679, 725-26 (1973 & Supp.1993). 41 F.3d at 531. The cases cited thereat all relate to situations where the decedent is a child and the survivors are parents. It is undisputed that in such situations, where the courts must address the issue of whether the decedent would have continued to support the parents, the financial situation of the parents is relevant to determining pecuniary loss. The legal issue differs when the relationship between decedent and survivors differs. In the present case, the decedent and survivor were husband and wife, not parent and child.

income to mitigate the damages that tortfeasers must pay.[5] The lower court's decision will encourage defendants to shift the burden of paying for their violation of the law by looking to the survivor's income. This result subtly discriminates because it discourages survivors from working. Once defendants can introduce evidence of the spouse's income, economic experts will also start discounting for possible further education and increased earning capacity. Courts will then offset awards to formerly dual income households by the remaining, independent income. As a result of the Ninth Circuit's decision, the Congressional mandate of compensation for pecuniary loss will become irrelevant. Left unreviewed,

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[5] The courts below have not addressed the issue in regard to federal wrongful death statutes, but the issue has arisen in application of state law. See *Simpson v. United States*, 322 F.2d 688, 692 (5th Cir. 1963) (applying Texas law in a Federal Tort Claims Act action, held that to "reduce the calculation of her pecuniary loss by the amount of income which she herself can earn, . . . is normally an improper factor to take into consideration"); *Delhi-Taylor Oil Corp. v. Huebner*, 342 F.2d 418 (5th Cir. 1965) (per curiam) (diversity action) ("the trial court did not err in excluding evidence of Mrs. Huebner's earnings").

the lower court's decision could have a profound and dangerous impact on the legal standard that federal courts apply in calculating death benefits under DOHSA and a number of other federal wrongful death statutes.

CONCLUSION

The decision of the Ninth Circuit engages in judicial legislation by rewriting DOHSA to supplant the general maritime law for torts aboard foreign-flag vessels in foreign coastal waters. It also reinterprets, without precedent or analysis, DOHSA's "pecuniary loss" standard to penalize surviving spouses who earn incomes of their own, and to give wrongdoers a windfall from that collateral source. This Court is the final arbiter of admiralty law. For the reasons stated above, it should grant the Petition and issue a writ to review the decision of the Ninth Circuit.

Respectfully submitted,

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CHAPTER 21—DEATH ON HIGH SEAS BY WRONGFUL ACT

Sec.

761. Right of action; where and by whom brought.
762. Amount and apportionment of recovery.
763. Limitations.
764. Rights of action given by laws of foreign countries.
765. Death of plaintiff pending action.
766. Contributory negligence.
767. Exceptions from operation of chapter.
768. Pending suits.

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Mar. 30, 1920, c. 111, § 2, 41 Stat. 537.

§ 763. Limitations

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

Mar. 30, 1920, c. 111, § 3, 41 Stat. 537.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

§ 765. Death of plaintiff pending action

If a person die [1] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

Mar. 30, 1920, c. 111, § 5, 41 Stat. 537.

[1] So in original. Probably should read "dies".

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

Mar. 30, 1920, c. 111, § 6, 41 Stat. 537.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Mar. 30, 1920, c. 111, § 7, 41 Stat. 538.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIKA L. HOWARD, individually and as Personal Representative of the ESTATE OF KENNETH JAMES HOWARD, Deceased,
Plaintiff-Appellant,

and

ROLF HOWARD,
Plaintiff,

v.

CRYSTAL CRUISES, INC., a California corporation,
Defendant-Appellee.

No. 93-15489
D.C. No.
CV-91-00642-DFL
OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
July 14, 1994—San Francisco, California

Filed December 1, 1994

Before: Edward Leavy and Andrew J. Kleinfeld, Circuit Judges, and Fred van Sickle,* District Judge.

Opinion by Judge Leavy

*The Honorable Fred van Sickle, United States District Judge for the Eastern District of Washington, sitting by designation.

SUMMARY

Admiralty and Marine/Torts/International Law

The court of appeals affirmed a district court judgment. The court held that the district court did not err by applying the Death on the High Seas Act (DOHSA) as the exclusive remedy in an admiralty wrongful death action arising from an incident that occurred within the territorial waters of a foreign state.

Appellant Vika Howard took a Mexican vacation cruise with her husband and their son. Appellee Crystal Cruises, Inc. (Crystal), a California corporation, operated the vessel. While disembarking from the vessel as it lay anchored within Mexican territorial waters, Howard's husband suffered a severe laceration to his right Achilles tendon. Less than a month after returning home, Howard's husband fell ill and died as a result of blood clots from the injured area.

Howard filed a wrongful death action in the district court against Crystal, asserting individual claims on behalf of herself, her son, and her mother-in-law, as well as claims on behalf of her husband's estate, under the general maritime law of the United States and the DOHSA. The district court concluded that the provisions of the DOHSA governed the action. The court found in favor of the plaintiffs and awarded them damages.

Howard appealed, contending that the district court erred by applying the DOHSA rather than the general maritime law, and by reducing the damages for lost income and services by 30 percent to reflect her husband's personal consumption.

[1] The DOHSA provides that the personal representative of a decedent may sue for damages in admiralty in the district court whenever the death is caused by a wrongful act occurring on the "high seas" beyond a certain distance from the

shore of a state, the District of Columbia, or United States territories or dependencies. [2] The district court did not err by applying the DOHSA as the exclusive remedy in this case. There is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant, particularly when the law in question was expressly designed to cover wrongful deaths occurring outside the territorial boundaries of the United States.

[3] Howard's own economic expert expressed the concept of "personal consumption" in terms of a percentage of total household income, and relied on a chart which showed that the average head of household in a two-person/two-income household consumes 30 percent of the total household income. The district court did not clearly err in finding that Howard's testimony concerning her husband's unusual frugality was unsupported by the evidence.

COUNSEL

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Walter T. Johnson, Lillick & Charles, San Francisco, California, for the defendant-appellee.

OPINION

LEAVY, Circuit Judge:

This appeal arises out of an admiralty wrongful death action in which a widow appeals from the district court's entry of judgment in her favor, arguing that the court erred by applying a federal statute rather than general maritime law to

her claim, and by miscalculating the economic impact to her of her husband's death. We reject these contentions and affirm.

FACTS AND PRIOR PROCEEDINGS

In September 1990, Kenneth James Howard ("Howard"), his wife, Vika, and their son, Rolf, took a Mexican vacation cruise aboard the CRYSTAL HARMONY, a vessel of Bahamian registry operated by Crystal Cruises, Inc. ("Crystal"), a California corporation. While disembarking from the CRYSTAL HARMONY as it lay anchored within Mexican territorial waters, Howard suffered a severe laceration to his right Achilles tendon. He received emergency medical attention aboard the CRYSTAL HARMONY and underwent surgery in Acapulco to repair the damaged tendon. Less than a month after returning home to Sacramento, Howard suddenly fell ill and died. An autopsy revealed that blood clots from the injured area had lodged in his pulmonary arteries and fatally obstructed the flow of blood to his lungs.

Seven months later, Mrs. Howard filed the instant wrongful death action in federal district court against Crystal, asserting individual claims on behalf of herself, her son, and her mother-in-law, as well as claims on behalf of Howard's estate, under the general maritime law of the United States and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-67. Following a bench trial, the district court found in favor of the plaintiffs and awarded them damages totalling $373,379 plus prejudgment interest. Both parties then filed timely motions to alter or amend the judgment under Fed. R. Civ. P. 59(e). The court granted the motions and entered an amended judgment, again in favor of the plaintiffs, for $378,794 plus postjudgment interest. Mrs. Howard (hereafter, "appellant") has timely appealed from the amended judgment, arguing that the district court erred by applying DOHSA rather than the general maritime law, and by reducing the

damages for lost income and services by 30% to reflect Howard's personal consumption.

ANALYSIS

I. *DOHSA/General Maritime Law*

The district court concluded that the provisions of DOHSA governed this action. That determination involves a question of law subject to *de novo* review. *See Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993) (all legal conclusions of district court sitting in admiralty examined de novo).

[1] Section 1 of DOHSA provides that

> [w]henever the death of a person shall be caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . .

46 U.S.C. § 761.

It is undisputed that Howard died as the result of a wrongful act that occurred "beyond a marine league [i.e., three nautical miles] from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States[.]" *See id.* Accordingly, and in order to determine whether the district court correctly applied DOHSA as the exclusive remedy in this wrongful death action, *see Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232-33 (1986), we must answer the question of whether something that happens within the territorial waters of a foreign state occurs on the "high seas" for purposes of DOHSA.

We are aware of only two reported decisions from this Circuit that have touched on the question of the meaning of "high seas" under DOHSA. In *Roberts v. United States*, 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974), we indicated, without deciding, that DOHSA's "high seas" could be read as applying to foreign territorial waters. *See id.* at 527 n.7 ("Because Congress only has power to fix the extent of territorial waters measured from the shores of its own country it may well have considered all waters beyond one marine league from those shores to be 'high seas' for purposes of DOHSA so long as navigable, even though within the territorial waters of a foreign state."). Nine years later we again discussed, but did not decide, the issue in *Williams v. United States*, 711 F.2d 893, 895 n.3 (9th Cir. 1983) ("It is not clear whether such tortious acts [i.e., those occurring within the territorial waters of foreign states] fall within the purview of the DOHSA.") (citing *Roberts*).

While it is true that we have not previously disposed of this precise question, the clear weight of authority rejects the appellant's position. *See, e.g.*, 2 Ellen M. Flynn, *et al.*, *Benedict on Admiralty* § 81c, at 7-11 n.20 (7th ed. 1993) ("It appears to be settled that the term 'High Seas' within the meaning of DOHSA is not limited to international waters, but includes the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore."); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-2, at 238 (1987) (DOHSA applies "even [to] those killed in foreign territorial waters.") (footnote omitted). *Accord Sanchez v. Loffland Bros.*, 626 F.2d 1228, 1230 & n.4 (5th Cir. 1980) (per curiam) (seaman killed in Venezuela), *cert. denied*, 452 U.S. 962 (1981); *Public Admin'r of New York County v. Angela Compania Naviera, S.A.*, 592 F.2d 58, 60-61 (2d Cir.) (Greek seaman from Liberian-Panamanian ship died in Greece after sailing in Indian, Pakistani, and Japanese waters), *cert. denied*, 443 U.S. 928 (1979); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 803-804 & n.9 (E.D. Pa.) (helicopter crash in Scottish waters), *as modified on reh'g*, 677

F. Supp. 803 (1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277, 1280 (W.D. Pa. 1983) (scuba diving accident in Bahamian waters), *aff'd*, 738 F.2d 423 (3d Cir.), *cert. denied*, 469 U.S. 858 (1984); *First & Merchants Nat'l Bank v. Adams*, 1979 A.M.C. 2860, 2863-64 (E.D. Va. 1979) (plane crash in Canadian waters), *aff'd in part, rev'd in part on other grounds*, 644 F.2d 878 (4th Cir. 1981); *Kunreuther v. Outboard Marine Corp.*, 757 F. Supp. 633, 634 (E.D. Pa. 1991) (snorkeling accident in Jamaican waters); *Moyer v. Klosters Rederi*, 645 F. Supp. 620, 623-24 (S.D. Fla. 1986) (cruise ship passenger died after snorkeling in Mexican waters); *In re Air Crash Disaster Near Bombay*, 531 F. Supp. 1175, 1182-84 (W.D. Wash. 1982) (plane crash in Indian waters); *Cormier v. Williams/Sedco/Horn Constructors*, 460 F. Supp. 1010, 1011-12 (E.D. La. 1978) (seaman drowned in Peruvian river); *Mancuso v. Kimex, Inc.*, 484 F. Supp. 453, 454-55 (S.D. Fla. 1980) (plane crash in Jamaican waters); *Hamill v. Olympic Airways, S.A.*, 398 F. Supp. 829, 834 (D. D.C. 1975) (plane crash in Greek waters) (implicit in dictum).

[2] Applying the above authorities to the facts of this case, we conclude that there is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant, particularly when the law in question was expressly designed to cover wrongful deaths occurring outside the territorial boundaries of the United States. Accordingly, we hold that the district court did not err by applying DOHSA as the exclusive remedy here.[1] *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. at 232-33.

[1]Citing *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), Crystal contends that the general maritime law of the United States would not make a difference in the outcome of this appeal, even if we were to hold that DOHSA does not govern this action. While support exists for this position, *see, e.g.*, Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 5-7 at 53, 7-3 at 91 (Supp. 1992) and cases collected thereat, we decline to reach the merits of this argument in the light of our holding.

II. *30% Reduction of Damages*

After calculating the total amount of damages to be awarded the appellant for her loss of Howard's support and services, the district court reduced those figures by 30% to reflect that portion of the recovery which the court found should be attributed to Howard's personal consumption. The appellant asserts two challenges to the district court's calculations: First, she argues that it was error to apply the 30% figure to the household income (i.e., both her salary and Howard's wages as a grocery clerk) rather than to Howard's income alone, because Howard was unusually frugal, and including her income violates the collateral source rule; and second, she argues that no reduction should have been taken against the valuation of Howard's services, because those services (e.g., painting the house and maintaining the car) were indivisible. We review the district court's computation of damages following a bench trial for clear error. *See Tonry v. Security Experts, Inc.*, 20 F.3d 967, 970 (9th Cir. 1994). Whether the district court selected the correct legal standard for computing those damages, however, is a question of law subject to *de novo* review. *Id.* at 972.

Section 2 of DOHSA provides that damages must represent "a fair and just compensation for the pecuniary loss sustained[.]" 46 U.S.C. § 762. *Accord* 1 Martin J. Norris, *The Law of Maritime Personal Injuries* § 6:5, at 320 (4th ed. 1990) ("Under the Death on the High Seas Act [a widow] is entitled to a fair and just compensation for the pecuniary loss she has suffered by the reason of the death of the decedent.") (footnote omitted). As a practical matter, these damages are limited to two things: loss of support and loss of services. *See* 2 Martin J. Norris, *The Law of Seamen* § 29:1, at 307 (4th ed. 1985).

[3] The appellant's own economic expert expressed the concept of "personal consumption" in terms of a percentage of total household income, and relied on a chart (the so-called

"Cheit Table") which showed that the average head of household in a two-person/two-income household consumes 30% of the total household income. The district court found that the appellant's testimony concerning Howard's unusual frugality was unsupported by the evidence.[2] We find no clear error in this holding, both as to loss of income and loss of personal services.

As for the argument concerning the collateral source rule, the appellant cites to no relevant authority for the proposition that her own income should not be taken into consideration as a portion of the total household income. Indeed, the clear weight of authority indicates that alternative means of support available to an adult beneficiary (exclusive of remarriage and, perhaps, insurance) in a DOHSA action may be taken into consideration by a court. *See, e.g.*, Joseph E. Edwards, Annotation, "Determination of Amount of Award of Damages Under Death on the High Seas Act (46 USCS §§ 761-768)," 16 A.L.R. Fed. 679, 725-26 (1973 & Supp. 1993) and authorities collected thereat.

CONCLUSION

We conclude that the district court did not err in its determination that DOHSA provides the exclusive remedy for the appellant's wrongful death action, and we reject the appellant's contention that the district court erred by reducing her lost income and services damages by 30% to reflect Howard's personal consumption. Because we find no merit to any of the appellant's remaining arguments, the decision of the district court is

AFFIRMED.

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[2]For example, the district court pointed out that, whatever economies Howard may have taken in some matters, he and his wife used both incomes in order to take expensive vacations, as exemplified by the Mexican cruise that cost him his life.

FILED
FEB 24 1992
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VIKA L. HOWARD, individually and as the personal representative of the ESTATE OF KENNETH JAMES HOWARD, Deceased; and ROLF HOWARD,

Civ. S-91-642-DFL

ORDER

v.

CRYSTAL CRUISES, INC., a California corporation,

Defendant.
_____/

Plaintiff Kenneth Howard was injured while disembarking from a ship owned by defendant Crystal Cruises. He subsequently died of blood clots that were allegedly caused by that injury. Howard's wife and son, Vika and Rolf Howard, allege that Howard died as a result of Crystal Cruises' negligence. The primary issue presented by the parties' cross-motions for summary judgment is whether the Death on the High Seas Act ("DOHSA") is applicable here, and if so, whether it precludes the Howards' survival action and general maritime wrongful death action.

[*2] On its face, DOHSA only applies to deaths occurring on the high seas. The accident here occurred in foreign territorial waters. Because the court concludes

that the primary purpose of DOHSA was to create a remedy for deaths occurring outside the reach of the state courts, the court holds that foreign territorial waters are within the purview of DOHSA. Where DOHSA applies, general maritime wrongful death claims are precluded because DOHSA is an exclusive remedy. However, because DOHSA does not address survival actions, the court finds that the Howards' survival claim can coexist with DOHSA.

The Howards also move to amend their complaint to add claims for negligent infliction of emotional distress. The court finds such a claim barred by Supreme Court precedent as well as DOHSA, and so denies the motion to amend.

I
FACTS AND PROCEDURAL HISTORY

On September 16, 1990, Kenneth, Vika, and Rolf Howard were passengers on the s Crystal Harmony, a cruise ship owned by Crystal Cruises and registered in the Bahamas. In order to go to the port of Zihuatanejo, Mexico, the Howards walked down a gangplank to a floating platform. From the platform, they planned to board a boat that would take them ashore. Kenneth Howard was injured when the gangplank slid into the back of his ankle as he stood on the platform. While in Mexico, Howard received medical care for the damage to his Achilles tendon.

[*3] Howard returned to his home in Sacramento and died approximately three weeks later. The cause of death was a blood clot that travelled to his lungs and obstructed the flow of blood. The Howards allege that the blood clot was caused by the ankle injury, and that Crystal Cruises's negligence was the proximate cause of death.

The Howards bring the following causes of action against Crystal Cruises: (1) a wrongful death claim under general maritime law; (2) a survival action for Kenneth Howard's estate; (3) a wrongful death claim for unseaworthiness; (4) a claim under DOHSA; and (5) a claim for "breach of maritime contract/maritime tort." The Howards now move to amend their complaint to add a claim for negligent infliction of emotional distress, and for partial summary judgment on the question of whether DOHSA is applicable to their claims. Crystal Cruises brings its own motion for summary judgment on the Howards' first, second and third claims, asserting that those claims are precluded under DOHSA.

II
JURISDICTION

The federal courts have admiralty jurisdiction over all torts that occur in navigable waters and bear a "significant relationship to traditional maritime activity." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 672-75 (1982); *Executive Jet v. City of Cleveland*, 409 U.S. 249, 268 (1972). A passenger who [*4]injures his foot while stepping from a gangway onto a floating platform has suffered an injury within the court's admiralty jurisdiction. *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 20607 (1st Cir.1988).

III
DOHSA'S PRECLUSIVE EFFECT ON WRONGFUL DEATH CLAIM

When DOHSA was enacted, there was no remedy for wrongful death outside the territorial waters of the United States. See *The Harrisburg*, 119 U.S. 199 (1886). DOHSA created a wrongful death action for a person

who dies as the result of an act "occurring in the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 46 U.S.C. § 761 (1988). The Act contains specific and limited statutory remedies. The courts have interpreted DOHSA to provide an exclusive remedy where it is applicable, but have allowed general maritime causes of action to go forward where DOHSA is inapplicable.

Crystal Cruises asserts that DOHSA applies to the Howards' claim and thus that the Howards' cause of action for wrongful death under general maritime law and the estate's survival action are precluded. The Howards argue that DOHSA is inapplicable because Kenneth Howard's accident occurred in Mexico's territorial waters and not in the international high seas. Resolution of this issue turns on whether Congress [*5]intended DOHSA to apply to the high seas outside of all territorial waters, or whether it was intended to apply more broadly to accidents that occur in areas outside the reach of state courts.

The Ninth Circuit has specifically reserved the question of whether DOHSA applies to torts that occur in foreign territorial waters. *Roberts v. United States*, 498 F.2d 520, 524 (9th Cir.1974). Although the court disposed of the case on other grounds, it suggested that DOHSA was applicable to an accident occurring just off the shore of Okinawa:

> Because Congress only has power to fix the extent of territorial waters measured from the shores of its own country it may well have considered all waters beyond one marine league from those shores to be "high seas" for purposes of DOHSA so long as navigable, even though within the territo-

rial waters of a foreign state.

Id. at 524 n.7. See also *Williams v. United States,* 711 F.2d 893, 895 n.3 (9th Cir.1983) (applicability of DOHSA in foreign territorial waters an unresolved question in this circuit).

Although no federal appellate court has reached this issue,[1] a number of district courts have considered it and nearly [*6]unanimously found that DOHSA applies to foreign territorial waters. In *Moyer v. Klosters Rederi,* 645 F.Supp. 620 (S.D. Fla.1986), the court found nothing in the legislative history of DOHSA or in the act itself to indicate that Congress intended to limit the remedies available under DOHSA to international waters. Id. at 624. Congress's primary purpose in enacting DOHSA was to create a uniform federal maritime tort action for deaths occurring outside the reach of the states. *See Jennings v. Boeing Co.,* 660 F.Supp. 796, 803 (E.D.Pa.1987), *aff'd,* 838 F.2d 1206 (3d Cir.1988). This result would not be accomplished if deaths occurring in foreign territorial

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[1]The Fifth Circuit briefly considered this issue in *Sanchez v. Loffland Bros. Co.,* 626 F.2d 1228, 1230 (5th Cir.1980), *cert. denied,* 452 U.S. 962 (1981), but disposed of the case on statute of limitations grounds. The court found that DOHSA applied to a seaman who drowned in a lake in Venezuela. Sanchez gives the court little guidance because the applicability of DOHSA was apparently not disputed by the parties, and the court permitted a general maritime wrongful death claim to proceed after finding DOHSA applicable. In the Ninth Circuit, DOHSA bars general maritime wrongful death claims.

waters were compensated or not according to the tort recovery provisions of the foreign country where the death occurred. *See also Mancuso v. Kimex, Inc.*, 484 F. Supp. 453, 455 (S.D. Fla.1980) (plane crash in Jamaican territorial waters); *Cormier v. Williams/Sedco/Horn Constructors*, 460 F.Supp. 1010 (E.D. La.1978) (seaman drowned in Peruvian territorial waters).

The sole case that the Howards cite in which the court found DOHSA inapplicable, *Leano v. States Marine Lines*, 1970 A.M.C. 1694 (C.D. Cal.1969), contains no reasoning, only a conclusion. The *Leano* court held that it lacked jurisdiction over claims arising out of deaths that occurred in Manila Bay in the Philippines. The court listed its legal conclusions, one of which was that it lacked jurisdiction under DOHSA, but gave no analysis.

In view of the numerous and more thoroughly reasoned cases [*7]arriving at an opposite result, the court declines to follow *Leano*. As the majority of courts to examine the issue have noted, the purpose of DOHSA was to create a federal remedy for harms beyond the reach of state law. *See Moragne v. States Marine Lines*, 398 U.S. 375, 394 (1970). Its purpose was not to distinguish between the high seas and foreign territorial waters. Thus, the use of the term "high seas" in the Act does not signify an intent by Congress that foreign territorial waters be excluded from its scope. Moreover, in this area of law, Congress and the courts have striven to provide a measure of uniformity. Thus, in *Moragne*, the Court implied a federal cause of action for wrongful death claims within state territorial waters--outside the reach of DOHSA--in part to prevent the lack of uniformity that would result were plaintiffs left to state law remedies. *Id.* at 401 (noting Congress' "strong concern for uniformity"). Application of DOHSA to foreign territorial waters similarly assures "uniform vindication

of federal policies." *Id.* For these reasons, and consistently with the weight of authority, the court concludes that DOHSA applies to foreign territorial waters.

If DOHSA applies to the Howards' claims, the next inquiry is whether DOHSA precludes the Howards' general maritime claim for wrongful death. In *Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1348 (9th Cir.1987), the Ninth Circuit held that remedies provided by DOHSA may not be supplemented by non-statutory remedies. The court found that DOHSA embodied:

[*8] "Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.... [When Congress] speaks directly on a question, the courts are not free to supplement Congress' answer so thoroughly that [DOHSA] becomes meaningless."

Id. (quoting *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978). If DOHSA actions could be supplemented by general maritime law, then the limitations Congress placed in DOHSA would be nullified. *See Bergen,* 816 F.2d at 1349. Accordingly, the Howards' claim for wrongful death under general maritime law is precluded by DOHSA. Crystal Cruises' summary judgment motion is granted as to this claim.

IV
PRECLUSIVE EFFECT OF DOHSA ON A SURVIVAL ACTION

The Howards' third cause of action requests damages for predeath pain and suffering, medical and funeral expenses, and predeath lost wages in a survival action under the general maritime law. Crystal Cruises argues that DOHSA's wrongful death remedy is Howard's sole remedy because DOHSA displaces all general maritime

law. The Howards assert that DOHSA only displaces general maritime law in the areas to which it speaks, and that DOHSA does not address survival claims. Because DOHSA does not contain survival provisions, the Howards argue, DOHSA does not preclude that type of recovery.[2] Although it is a close [*9]question, the court finds the Howards' survival claim is not precluded by the application of DOHSA to their wrongful death claims.

The Supreme Court has not addressed whether DOHSA preempts survival actions under general maritime law or even whether general maritime law permits of a survival action. Traditional maritime law did not provide a survival cause of action. *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371 (1932). In *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990), the Court acknowledged lower court decisions supporting a change in the general maritime rule barring survival actions, but concluded that the case before it did not require resolution of this issue.[3] The *Miles* plaintiff sued under both the

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[2]The damages available under a survival cause of action are those that the decedent could have recovered had he lived, such as pre-death pain and suffering, and pre-death lost wages. The plaintiff in a survival action is the decedent's estate. In contrast, the damages available under wrongful death are for the loss to the surviving family members--primarily the lost wages that the decedent would have earned had he not died. The plaintiffs in wrongful death actions are the surviving family members, not the estate.

[3]The Supreme Court in Miles stated:
Miles argues that we should follow the Courts of Appeals and recognize a general maritime

Jones Act[4] and [*10]general maritime law, asking for the decedent's lost future earnings as survival damages under general maritime law. The Court relied heavily on *Moragne* to evaluate the *Miles* plaintiff's claims:

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide [the Court's] decision in this case ... an admiralty court should look primarily to [applicable] legislative enactments for policy guidance. [The Court] may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. . . .

Miles, 111 S.Ct. at 323.

Based on these principles, the Court held that the damages provided by the Jones Act survival provisions were the plaintiff's exclusive remedy. The Jones Act does not permit recovery of decedent's lost future earnings.

> survival right. Apex urges us to reaffirm the traditional maritime rule and overrule these decisions. We decline to address the issue, because its resolution is unnecessary to our decision on the narrow question presented: whether the income decedent would have earned but for his death is recoverable [in a survival action.] We hold that it is not.

111 S.Ct. at 327.

[4] "The Jones Act allows a seaman to bring an injury or death action against the master of his vessel." *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir.1985) (citing 46 U.S.C. § 688(a) (1982)).

Therefore, the Court denied plaintiff's claim for these damages. The Court did not reach the issue of whether DOHSA precludes survival damages. Crystal Cruises claims that the Court's denial of survival damages in *Miles* is controlling here. However, because the Court expressly refused to reach the question of whether survival actions are precluded by DOHSA, *Miles* does not control this case.

The Ninth Circuit also has not spoken directly to this issue. Crystal Cruises relies on *Bergen,* in which the court held that DOHSA precluded recovery of any damages other than those specifically provided by the statute. The *Bergen* [*11]plaintiff brought claims under both the Jones Act and DOHSA. The court found punitive damages unavailable, holding that "where an action under DOHSA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law." *Bergen,* 816 F.2d at 1349. However, because survival claims are not merely a special type of damages, like punitive damages, but are a separate basis for recovery, Bergen does not control the present case. The Bergen court held only that DOHSA may not be supplemented by damages that the statute does not provide. It did not hold that all general maritime causes of action are precluded solely because DOHSA is also applicable.

The Ninth Circuit did discuss the coexistence of DOHSA and survival actions in dicta in *Evich v. Connelly,* 759 F.2d 1432 (9th Cir.1985), in which the court permitted a general maritime survival action for a death in state territorial waters. The court rejected the defendants' assertion that DOHSA provides the exclusive remedy for maritime death actions. Although DOHSA was not applicable in *Evich* because the death occurred in state

territorial waters,[5] the court noted with approval the holding [*12]in *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir.1984), permitting a general maritime law survival action to coexist with DOHSA claims:

> The Fifth Circuit has allowed survival actions to supplement DOHSA actions. We agree [with *Azzopardi*], and conclude that there is no bar to maritime survival actions based on Moragne.

Id. at 1434 (citation omitted).

In *Azzopardi,* the plaintiff brought a general maritime survival action as well as a wrongful death cause of action under DOHSA. The plaintiff's son was employed as a diver on an oil rig in the English Channel. After reviewing both the legislative history of DOHSA and case law interpreting it, the Fifth Circuit found that DOHSA's scope is limited to wrongful death actions and does not affect survival actions. The court concluded that DOHSA contained a gap in coverage with regard to survival claims, and permitted a general maritime survival action to fill the gap left by DOHSA.

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[5]The death in *Evich* occurred near an island off the coast of Alaska, inside Alaska's territorial waters. Because the death did not occur on the high seas, DOHSA was inapplicable. The *Evich* defendants argued that DOHSA provides the sole remedy, and that no survival actions was available because DOHSA does not provide survival recovery. The court relied on *Moragne,* which permitted a general maritime law wrongful cause of action in state territorial waters, in rejecting the defendants' argument that DOHSA provides the sole remedy for maritime deaths.

> As Justice Stevens pointed out in *Higginbotham*, "there is a basic difference between filling the gap left by Congress' silence, and rewriting rules that Congress has affirmatively and specifically enacted." 436 U.S. at 625. Since DOHSA is a wrongful death statute which, whether through inadvertence or design, does not address survival actions, it is entirely appropriate that the courts should fill what would otherwise be a legislative void by allowing the general maritime law survival action based on *Moragne* to supplement DOHSA.

742 F.2d at 894. *See Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974) (survival damages allowed under general maritime law because DOHSA does not provide survival damages); *Favaloro v. S/S Golden Gate*, 687 F.Supp. 475 (N.D. Cal.1987) (adopting Azzopardi's gap-filling approach); *Kuntz v. Windjammer* [*13]*"Barefoot" Cruises*, 573 F.Supp. 1277, 1286 (W.D. Penn.1983), *aff'd w/o op.*, 738 F.2d 423 (1984) (*Moragne*'s reasoning relied upon to permit general maritime law survival action to supplement DOHSA wrongful death claim).

The court follows *Azzopardi*, Ninth Circuit dicta, and the weight of other authority, and holds that DOHSA is not a bar to survival actions. Although there is an argument to be made that Congress would have provided a statutory survival cause of action if it had intended for plaintiffs to recover for survival damages, the court is more persuaded by the gap-filling analysis of *Azzopardi*. The reasoning in *Azzopardi* is consistent with the Supreme Court's approach in *Moragne*. Thus, when Congress fails to provide a statutory recovery, the courts may look to general maritime law to supplement statutory provisions. On the other hand, when Congress has provided specific, albeit limited, remedies the courts are not free to create additional remedies. In this case, Con-

gress has not provided a remedy. It has simply left the area unaddressed. In keeping with *Moragne,* the court finds that Congress' failure to provide any survival remedy in DOHSA does not evince an intent that no such remedy be provided. For these reasons, and in light of the clear weight of authority, the court finds that Howard's survival action under general maritime law is not precluded by DOHSA.

[*14] V

WRONGFUL DEATH BASED ON UNSEAWORTHINESS

The doctrine of unseaworthiness, a type of strict liability that permits recovery for harm suffered as a result of an unseaworthy vessel, is limited to seaman and does not extend to passengers. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 629 (1959); *Craig v. M/V Peacock,* 760 F.2d 953, 955 (9th Cir.1985). Howard was a passenger, and so cannot recover under this theory.

Although the Howards recognize that *Kermarec* controls, they argue that this court should deny Crystal Cruises' summary judgment motion, permit them to introduce evidence supporting this theory at trial, and then allow Crystal Cruises to renew their motion at the close of evidence. They argue that this theory is ripe for expansion, and that if the court permits them to proceed as they propose, they will have a record for appeal that will ultimately permit the Supreme Court or Congress to expand liability for unseaworthiness to passengers.

Kermarec controls this case and bars the Howards' action. There is no hint in recent caselaw that the wind is blowing toward expansion of the doctrine. To allow the Howards to present evidence on this issue at trial would impose an unreasonable burden on Crystal

Cruises. Crystal Cruises' summary judgment motion is granted as to the third claim.
[*15]

VI
THE HOWARDS' MOTION TO AMEND THEIR COMPLAINT

The Howards move to amend their complaint to add causes of action for themselves for negligent infliction of emotional distress. Crystal Cruises opposes the motion, arguing that these claims are barred by the remedies provided by DOHSA.

In *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974), the Supreme Court held that emotional distress was not compensable as part of a general maritime wrongful death action. The Howards concede that *Gaudet* limits the recovery for general maritime wrongful death claims, but asserts that *Gaudet* does not preclude a separate action for emotional distress.[6] To permit such an action would allow an end run around the limitation declared by the Court in *Gaudet*. A plaintiff bringing a wrongful death action could simply assert a separate action for negligent infliction of emotional distress, and recover damages specifically barred by the Court.

Furthermore, even if such an action were permissi-

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[6]Crystal Cruises asserts that *Gaudet* is no longer good law, citing the footnote in *Miles* stating that *Gaudet* is inapplicable on its facts due to amendments to the Longshore and Harbor Workers' Compensation Act. Although *Gaudet* may no longer apply to longshoremen, that does not cast doubt on its holding that emotional distress is not compensable as part of a general maritime wrongful death action.

ble as a companion to a general maritime wrongful death action, it is clearly precluded under DOHSA. Congress has provided specific and limited remedies for wrongful death under DOHSA. DOHSA is [*16]intended to compensate the families of the decedents, and it has failed to provide for emotional distress damages. An emotional distress claim would also compensate the families, and would circumvent the limitations of DOHSA.

The Howards' motion to amend their complaint is denied.

VII

Crystal Cruises' motion for summary judgment on the general maritime wrongful death claim is GRANTED.

Summary judgment on the survival cause of action is DENIED.

Summary judgment on the unseaworthiness claim is GRANTED.

The Howards' motion to amend their complaint to add a cause of action for negligent infliction of emotional distress is DENIED.

IT IS SO ORDERED.

Dated: 21 February 1992.

/s/David F. Levi
DAVID F. LEVI, Judge
United States District Court

FILED
FEB 11 1993
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VIKA L. HOWARD, individually and as the personal representative of the ESTATE OF KENNETH JAMES HOWARD, Deceased; and ROLF HOWARD,

Plaintiffs,

v.

CRYSTAL CRUISES, INC., a California corporation,

Defendant.

_____/

Civ. S-91-642-DFL

AMENDED ORDER

This case was tried to the court on September 8-10, 1992. A memorandum of decision was issued on September 16, 1992, constituting the court's findings of fact and conclusion of law pursuant to Fed. R. Civ. P. 52(a). Judgment was entered in accordance therewith on September 17, 1992. The parties filed motions to amend the judgment pursuant to Fed. R. Civ. P. 59(e), and a hearing was held on those motions on January 29, 1993. Having considered those motions, all papers submitted in support thereof, [*2]and the arguments presented by counsel at the hearing and good cause appearing therefore, the court enters the following amended memorandum of

decision.

I.

In September 1990, Kenneth James Howard, his wife Vika and his son Rolf took a vacation aboard the cruise ship Crystal Harmony. Defendant Crystal Cruises, Inc., a California corporation, was the operator of the cruise ship. On the afternoon of September 16, 1990, the ship was anchored in the Bay of Zihuatanejo, Mexico. So that passengers could go ashore if they wished, the ship had set up its tendering platform from which the tender would pick up passengers and ferry them to shore. The tendering platform is a platform suspended by wires and secured to the hull of the ship. The platform floats on the water and moves with the action of the water.

To reach the tendering platform, passengers descend an outside gangway known as an accommodation ladder -- a metal portable stairway of about 15 steps positioned parallel to the side of the ship. The gangway rests on the tendering platform. Because the gangway -- which is attached to the ship -- and the tendering platform are subject to the action of the water, sometimes in different degrees, the bottom of the gangway rests on wheels. Because of the wheels, and the placement of the wheel axle, the final step of the gangway is about 12-3/4 inches from the deck of the tendering platform. To lessen the effect of this high step, it was the defendant's practice to place a portable [*3] wooden box step, covered by artificial turf, at the foot of the gangway, beneath the final step. The wooden box step is about 6 inches high and is approximately 2 feet square. The box step is

narrower than the width of the gangway, such that the gangway may roll forward and then backward over the box step when the ship or platform moves.

Rolf and Vika Howard descended the gangway and boarded the tender without incident. When Kenneth Howard came down the gangway he was asked to wait at the foot of the gangway by two crewmen who were stationed at the bottom of the gangway to assist passengers. One of the crewmen, Arturo Espuerta, had been at the foot of the gangway, assisting passengers, since the tendering operation had begun. He had observed the ladder rolling fore and aft with the motion of the ship in the water. Both Espuerta and the other crewman were aware that the gangway rolled over the top of the wooden box step. The crewmen asked Howard to wait as passengers ahead of him boarded the tender. Each of the crewmen held one of Howard's hands. Unfortunately, the crewmen instructed Howard to wait with one foot -- his right foot -- on the wooden step and his other foot on the gangway.

Just as the crewmen told Howard to go ahead, a wave -- probably the wake from a powerboat -- caused the tendering platform to move. The gangway rolled forward over the wooden step and caught the back of Kenneth Howard's right ankle. The bottom edge of the stairway bit into Howard's Achilles tendon, cutting his leg above the ankle and nearly severing the tendon. [*4]

Members of the ship's crew assisted Howard back up the gangway, where he was placed in a wheelchair and taken to the ship's infirmary. The ship's doctor found that the right Achilles tendon had been 75-90% severed, and that surgery would be necessary. Because

there were no surgical facilities aboard the ship, he stitched and dressed the wound and placed it in a short cast.

The next day, September 17, the Howards disembarked, as scheduled, at Acapulco, the final stop of the cruise. Crystal Cruises arranged for the Howards to leave the ship first, with some special assistance for Kenneth Howard. Defendant's port agent arranged for a driver to take the Howards to an Acapulco hospital for surgery. At the hospital, a surgeon sutured the wound, and placed Howard's leg in a cast. Crystal Cruises paid for this operation. Following the operation, a driver -- arranged for by Crystal Cruises -- came to the hospital and took the Howards to the airport for their scheduled flight back to Sacramento. Upon his return home, Howard was treated by his family physician and his orthopedist.

Several weeks later, on October 11, 1990, in the early morning hours, without warning, Kenneth Howard was stricken. He had been restless and uncomfortable throughout the night, finding it difficult to sleep. At 4:00 a.m., Vika Howard found him sitting on the edge of the bed with a glazed look on his face. He was not responsive to her questions. He held his hands out to her for help without speaking. Mrs. Howard called for her son, who [*5] telephoned for emergency assistance. Kenneth Howard regained consciousness briefly during the ambulance trip to the hospital. He asked for water and said that he needed help breathing. Kenneth Howard died at the hospital at 5:32 a.m.

Kenneth Howard's death was caused by blood clots that had formed at the site of his injured ankle. The

clots broke loose and travelled through his heart and into his pulmonary artery where the clots lodged, blocking the flow of blood to both lungs. In this way, the ankle injury was the ultimate cause of his death. There was no negligence or deficiency in Howard's medical care. The possibility of blood clots is a known risk of trauma, but no medical intervention to prevent blood clots was appropriate in this instance.

II.

Plaintiff Vika L. Howard brings this lawsuit individually, on behalf of the wrongful death beneficiaries of her husband, and as personal representative of her husband's estate. Plaintiff Rolf Howard, the decedent's son, brings this lawsuit individually. The court has subject matter jurisdiction over this action under 28 U.S.C. § 1333. Plaintiffs seek recovery on three causes of action.[1] First, plaintiffs pray for damages for negligence under the Death on the High Seas Act (DOHSA), which provides for "a fair and just compensation for the pecuniary loss sustained by the [*6] persons for whose benefit the suit is brought." *See* 46 U.S.C. § 762. In this case the wrongful death beneficiaries are Vika and Rolf Howard, and Selma Howard, the decedent's mother. Second, the estate of

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[1]In an order of February 24, 1992, the court granted summary judgment for defendant as to plaintiffs' cause of action for wrongful death premised on general maritime law and the doctrine of unseaworthiness.

Kenneth Howard brings a survival action under the general maritime law seeking damages for Kenneth Howard's pain and suffering, funeral and medical expenses. *See* the court's February 24, 1992 order; *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984). Finally, plaintiffs allege that Crystal Cruises breached a maritime tort in connection with its conduct after the injury was sustained.

The court first addresses liability and then in the next session discusses the more vexing issues related to damages.

A shipowner has a duty of care "in seeing the safe embarking and disembarking of . . . passengers." *Isham v. Pacific Far East Line Inc.*, 476 F.2d 835, 837 (9th Cir. 1973) (citation omitted). In light of the above findings, the court finds that the injury to Kenneth Howard was caused by defendant's negligence. The design of the gangway was seriously flawed as plaintiffs' expert testified. The bottom step was too high, and such a high step was too high, and such a high step was unnecessary. Moreover, the defective nature of the design was well known to Crystal. Indeed, Crystal had attempted to ameliorate the condition caused by the high bottom step by placing the wooden box step at the foot of the gangway during tendering operations. Unfortunately, the box was only a partial solution and created the risk of injury such as occurred here. [*7] The juncture of the box step and gangway was dangerous and uncertain. At least one of the photographs taken on the day of the injury during tendering operations illustrates that the box step could become out of position, leading to an awkward gap between the gangway step and the box step. Crew mem-

bers were aware that the gangway could roll forward over the box step, and on the day of the accident but prior to Howard's injury, had observed the gangway roll over the box. Although in the brief life of the ship no other injury had occurred similar to that in this case, defendant was on notice that a person standing on the box step during tendering operations was at risk of being struck by the bottom step of the gangway. The use of such defective equipment was negligent in itself and invited injury. But beyond and apart from the negligence inherent in the decision to use defective equipment, it was incumbent on the crew to keep disembarking passengers away from the area in which the gangway would tend to roll. Kenneth Howard should not have been held at the bottom of the gangway with one foot on the gangway and one foot on the box step. This act of negligence by crew members in the tendering operation on September 16, 1990, is plain and needs no further elaboration. *See Carey v. Bahama Cruise Lines,* 864 F.2d 201 (1st Cir. 1988) (sliding gangway).

It is equally clear that the injury was the ultimate and legal cause of death. The injury was relatively minor, and in no way appeared to be life threatening; nonetheless, it was the cause of the blood clotting that led to death. All of the evidence [*8] suggests that there was no intervening medical malpractice on the part of any of the treating doctors.

Accordingly, the court finds liability as to the plaintiffs' cause of action under the Death on the High Seas Act and the survival action under general maritime law. However, the court does not find a breach of maritime contract or a maritime tort concerning Crystal

Cruises' conduct following the injury. The arrangements made by Crystal Cruises for the care of Kenneth Howard, and the transportation of the family, were sufficient and appropriate. The minor rudeness of the port agent and of hospital personnel in Acapulco while unfortunate does not constitute breach of contract by Crystal or maritime tort. Nor did Crystal assume a contractual duty to pay all medical expenses incurred by Howard in the treatment of his leg once he returned to Sacramento. To the extent that Kenneth Howard experienced some inconvenience and pain during the period after leaving the Crystal Harmony, and until arriving back home, this may be reflected in the survival action award.

Having found Crystal Cruises negligent, and its conduct the legal cause of death, the court turns to an evaluation of damages.

III.

A. DOHSA DAMAGES

Vika and Rolf Howard, as well as Selma Howard (Kenneth Howard's mother), may recover for loss of services, support and inheritance. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 584-86 (1974). "Pecuniary loss" does not include damages for [*9] mental anguish, grief, or loss of society. *See Miles v. Apex Marine Corp.*, __ U.S. __, 111 S.Ct. 317 (1980). The parties' experts take radically different views of the damages sustained by plaintiffs. Their estimations of loss are some $600,000 apart. There are three principle areas of difference. First, as to

Kenneth Howard's lost earnings, plaintiffs' expert estimates a loss $210,005 while defendant's expert calculates $25,625 in losses. Second, as to lost services for Vika Howard, plaintiffs seek $234,925 in damages whereas defendant's expert finds damages of $47,575. Finally as to lost services for Selma Howard, plaintiffs seek $257,250 in damages while defendant suggests a figure of $33,861.

1. *Lost Earnings*[2]

Kenneth Howard was a retail grocery clerk. He had been employed as such by Raley's since 1974. He was a member of the Retail Clerks' union and was covered by their pension program. Although the parties disagree as to whether Howard's final pay check may have included a payment for accumulated vacation pay, there is no dispute that at the time of his death Howard earned $13.78 an hour. He was working full-time at the time of his injury, and therefore his yearly salary was $28,662 (2,080 hours x [*10] $13.78 per hour). On February 29, 1992, retail clerks received a .30 per hour pay raise.

Howard was 55.3 years old at the time of his death. Using statistics for the national labor force, plaintiffs' expert found that Howard could be expected to

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[2]The court has discretion whether to consider tax consequences. Here the parties agree that tax consequences are not significant. Accordingly, the court does not attempt to calculate possible tax consequences as to the calculation of any of the damages plaintiffs seek.

work an additional 8.7 years to age 64. Using actuarial data from the Retail Clerks Pension Trust Fund, defendant's expert suggests that 61.5 is the average retirement age for male retail clerks in Northern California. Plaintiffs argue that the defendant's average figure is less accurate because it does not recognize that employees who are still working at age 55 may have a longer average employment than those employees who retire earlier. Defendant responds that the average for retail clerks in Northern California is more reliable that a national average for all trades. In addition, defendant argues that Howard's health was such that an earlier retirement date was more likely. Plaintiffs reply that Howard's health was sufficiently good that he was able to work full-time in 1990, and that he had no intent or plan to retire before age 64.

The medical evidence before the court does demonstrate some past and likely future medical problems. In the early and mid 1980's Howard experienced some back strain from lifting groceries. As a result he missed some 13% of work in each of two years. In 1987 he fell at Raley's and hurt his left knee, eventually requiring an operation known as meniscectomy. He worked only about one third of the year in 1987, because of knee and back [*11] injuries, and just over one half of the year in 1988 for the same reason.

According to Howard's physician, Dr. Hassan, Howard's knee problem was an arthritic condition that would reoccur. In addition, Howard's back problems were also degenerative. These problems were aggravated by the kind of work that Howard performed which required standing and some bending and lifting. Dr. Has-

san predicted that in 2-3 years from June of 1990, Howard would not be able to continue in a job requiring so much standing.

Dr. Hassan's deposition testimony is consistent with the medical records. For example, in a memorandum of June 4, 1990, just 2 1/2 months prior to the ankle injury, Dr. Hassan noted that Howard had back and neck pain, and had difficulty turning his head. The memorandum states that "[t]his patient has significant degenerative arthritic change in the cervical and lumbar spine." The memorandum concludes: "Hopefully, we can keep him working another couple of years since he is relatively young; although, he has put 30 years in at his present occupation." Exhibit 41.

The court finds that the medical evidence outweighs the meager evidence of Howard's intent to work until age 64. Moreover the medical evidence is supported by testimony from defendant's expert that by age 61.5 Howard would have received a pension within three to four thousand dollars of his average yearly earnings. Thus, the court accepts as more reasonable defendant's contention that Howard would have worked to age 61.5 This is over three years beyond the two to three years predicted by Dr. [*12] Hassan, but less than the eight years predicted by national tables.

On the other hand, the court declines to further reduce Howard's future work life by predicting some future work absences due to health problems. The injuries sustained in 1987 and 1988 were unique and were caused by an accident rather than a degenerative condition. Howard enjoyed his work and had a reliable work history. To the extent that Howard suffered from degen-

erative health problems, this aspect has been fully considered in setting his work life expectancy. Moreover, Howard was working full-time at the time of his injury. Thus, the court declines to average the hours worked over the period from 1985 through 1990, and assume a similar future work history through age 61.5. Rather, the court finds that Howard would have retired at age 61.5, but would have been able to work full-time up to that time.

The court finds the following in lost earnings:

(a) $40,413 for the period 9/29/90-2/29/92 (1.41 years) at $28,662 per year;

(b) $15,522 for the period 2/29/92-9/8/92 (.53 years) at $14.08 an hour for 1102.4 hours;

(c) $120,665 for the period 9/8/92 to Howard's projected retirement age of 61.5 years. This is based on annual earnings of $28,662 x 1.02 ($.30 pay raise) x 4.33 years. The resulting figure is then adjusted for future wage increases at an average rate of 5.2% per year and a discount rate of 7.2% per year, based [*13] on the testimony of plaintiff's expert. Based on this calculation, the present value of Kenneth Howard's lost future earnings is $120,665.

Total lost earnings come to $176,630.

The parties dispute by what percentage this total should be reduced to reflect Kenneth Howard's consumption. Plaintiffs use a 30% figure based on a table prepared by Earl F. Cheit which is attached to Mr. Goslin's report. Exhibits 37 and 38. The Cheit table indicated that 30% is the family head's consumption expenditure as a percentage of total family income. Notwithstanding the fact that the table relates to total family income, plaintiffs

suggest that the consumption reduction should be based only on Howard's income because Howard was so frugal. Defendant counters that a higher figure than 30% is appropriate based on national tables and that total household income is the relevant base.

The court finds that 30% is a fair figure in this case. The higher figure suggested by defendant does not adequately reflect that many expenses -- such as mortgage and household upkeep -- are fixed without regard to the number of family members. Surely Vika Howard should not be required to -- or assumed to -- move residences as part of the damage calculation. On the other hand, the evidence of Howard's frugality is anecdotal and vague. Mrs. Howard testified that she rarely wrote checks to Howard from the family checking account. But this testimony speaks only to Howard's need for cash and does not address his overall [*14] consumption. It appears that both experts normally would deduct a wage earner's consumption based on total family income because total family income dictates the standard of living for each member of the family. For example, the Howard's regularly took expensive cruises and other vacations that would not have been likely on Howard's earnings alone.[3] At the time of Howard's death, Vika Howard was earning $23,460 per year.

The court calculates an offset for lost consumption

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[3]The cruise on the Crystal Harmony cost $1,360 per person or $4,080 for the Howard family.

of $97,355, consisting of 30% of total household income.[4]

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[4]To derive this figure, the court first determined the value of total household income to the date of trial by taking Vika Howard's income for that period and adding it to Kenneth Howard's lost income for that period. Vika Howard's income for that period is $46,-136, which is the sum of $1,955/month x 12 months x 1.41 years ($33,079) plus $2,053/month x 12 months x .53 years ($13,057). Kenneth Howard's income for the same period has already been calculated to be $55,935. Total household income is $102,071 ($55,935 + $46,-136), and there is no reduction to present value. 30% of $102,071 is $30,631. Loss of support to the date of trial is therefore $25,314 ($55,935 - $30,631). To derive a figure for future loss of support, the court first calculated the value of total future household income to the date of Kenneth Howard's projected retirement at 61.5 years. For Vika Howard, the court multiplied her monthly wage times 4.33 years to obtain a figure of $106,674 ($2,053/ month x 12 months x 4.33 years). This figure is then adjusted for future wage increases and discounted to present value, just as Kenneth Howard's future income was adjusted, to obtain a figure of $101,681. The present value of Kenneth Howard's income for the same period has already been calculated to be $120,665. The present value of total future household income to the date of Kenneth Howard's projected retirement is $222,346 ($101,681 + $120,665). 30% of this figure is $66,704. Future loss of support is therefore $53,961 ($120,665 - $66,704). The sum of past and future loss of support to the date of Kenneth Howard's projected retirement is $79,275 ($25,314 + $53,961).

The total net lost income therefore is $79,275. [*15]

No amount of money is awarded for the alleged lost monetary value of Howard's health and welfare plan. Vika Howard testified that she is still covered by Kenneth Howard's plan. Although there is some confusion in the evidence as to whether Mrs. Howard should be so covered under the terms of the decedent's health plan, plaintiffs have not met their burden of demonstrating a loss in this area. Rolf Howard was not covered by Howard's health plan at the time of Howard's death.

2. *Lost Pension Benefits*

The experts do not differ very greatly as to the calculation of lost pension benefits. According to plaintiffs' expert, the total loss is $15,855. Using a consumption deduction of 45.1%, defendant's expert finds an actual gain of benefits of $4,156 due primarily to Vika Howard's receipt of widow's benefits. If defendant's calculations are refigured using the 30% consumption figure used above in the lost income calculation, then defendant's figures show a loss of $18,575 in pension benefits. Defendant's higher figure -- higher than plaintiffs -- results from the earlier retirement age that defendant projects. The court will round this figure up to $23,000 because defendant calculated annual benefits based upon a work rate of only 1,615 hours per year whereas the court has found that Howard would work a full work year.

Total lost pension benefits amount to $23,000. [*16]

3. *Loss of Services to Selma Howard*

Plaintiffs request $119,905 for the loss of future services for Selma Howard in addition to $39,065 in lost services accrued to the time of trial for a total of $158,970. With a minor change, the court finds that this request is reasonable and supported by a preponderance of the evidence. Howard was a loyal and dutiful son. He spent portions of every day caring for his mother, who suffers from senile dementia and requires 24 hour care. Since Selma Howard continued to live at home, Howard assumed responsibility for many of her household chores, including shopping and minor household repairs. He would sit with his mother when the caretaker took weekend days off. He paid bills, cooked, mowed the lawn, took his mother to the doctor, bathed her, and generally supervised her care. He managed Selma Howard's property, which included real estate as well as financial instruments, all of which was also in his name. After his death, Vika Howard assumed responsibility for Selma Howard's care and the management of her household and assets. In addition, because the property was not in her name, it was necessary to establish a conservatorship for Selma Howard.

Based on the conservatorship accounting provided at exhibit 32A the court concurs in the estimate by plaintiffs that some $16,094 must be spent each year as to Selma Howard's care as a result of Howard's death. When adjusted for future expenses and [*17] multiplied

by Selma Howard's expected life expectancy,[5] and then reduced to present value, the value of future loss of services to Selma Howard comes to $119,905. To this amount the court will add $39,018 for the two years of expenses prior to trial, for a total of $158,923.

4. *Management Services*

Plaintiffs seek over $170,000 for loss of investment management service based on the value of the investment management provided by Howard. Plaintiffs calculate this figure by comparison to what a full-time financial advisor might charge for investment advice and management. The comparison is neither apt nor fair. Although Howard had some interest in investment matters, he was not a trained analyst and did not have a research department at his disposal, not any of the various skills and resources of a professional money manager. The deposition of his broker demonstrates that Howard's approach was conservative and that he did not play to stock market or make frequent changes to his account. The sort of guidance provided by Howard is equally available from a stock broker at minimal cost. Accordingly, no separate adjustment is made for loss of investment management services. In the next section the court will include within loss of services some time for Howard's attention to financial matters which is sufficient to cover all invest-

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[5]The court declines to adjust Selma Howard's life expectancy. Defendant offered no medical evidence that a person suffering from advanced senility has a reduced life expectancy.

ment functions. [*18]

5. *Lost Services to Vika and Rolf Howard*

Plaintiffs seek $196,130 for lost services to the Howard family. This figure is based on an assumed 15-20 hours per week of household services for the remainder of his life expectancy of 19.5 years. Plaintiffs assume that the cost of such services will increase and that the current cost of such services is $12.50 an hour. Plaintiffs make no deduction for Howard's consumption of these services and also assume that Howard would have been able to provide such a level of services throughout his remaining life.

The court finds plaintiffs' figure to be inflated for a number of reasons. First, given the amount of time Howard spent caring for his mother -- which the court has awarded -- the 15 to 20 hours for home services is implausible. Nor is it supported by any direct evidence. Vika Howard praised her husband's attention to household needs, but no precise evidence was offered as to how much time a week Howard spent on household services. Second, it is necessary to deduct a certain portion -- 30% as before -- for Howard's consumption of his own services. This is particularly true because certain of the services, for example car maintenance, would be directly related to his activities. Third, the court notes that Howard suffered from knee and back problems. He could not easily bend or lift objects. These conditions were degenerative. Thus, it is unlikely that Howard could have maintained the same level of support throughout the remainder of his life. Finally, the $12.50

hourly wage figure is not supported by direct evidence. By contrast, defendant estimated that the [*19] same services could be hired for $9.00 per hour based on a 1991 Sacramento Area Wage Survey from the Bureau of Labor Statistics. Defendant's figure seems somewhat low given that certain of the services provided by Howard were specialized -- for example, automobile repair and family bookkeeping. The court will use an average wage of $10.75 an hour.

The court finds that on average Howard spent 8 hours a week on household matters, including 1.5 hours for financial matters. For the two year period from the injury to trial the lost value amount to $8,944 (52 x 2 x 8 x $10.75). This figure must be reduced by 30% to account for Howard's own consumption of his services, yielding a total of $6260. Using plaintiffs' expert's calculations, but using a different figure for time and hourly wage, the court calculated future lost services as $100,720 (5.6 x 10.75 x 52 x 19.5 x 1.65). The present value of this figure is $47,803. The total in lost services is $54,063.

6. *Loss of Inheritance*

Having assumed that all income earned by Howard would have been contributed to the support of Vika and Rolf Howard, the court makes no separate award for loss of inheritance. There would be double recovery were such an award made.

7. *Loss of Nurture*

Rolf Howard was 19 at the time of his father's death. He seeks an award for loss of nurture of $5,000 a year for the following four years. The parties agree that DOHSA permits of a loss of nurture award, and that some courts have permitted such an [*20] award to the age of 21. Loss of nurture is intended to compensate "for the loss of that care, counsel, training and education which [the child] might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation." *Brown v. United States,* 615 F. Supp. 391, 399-400 (D. Mass. 1985) (quoting *Michigan Central Railroad v. Vreeland,* 227 U.S. 59, 71 (1913). Guidance "in matters material, moral and spiritual" is compensable. Id. at 400. On the other hand, "a child's claim for loss of nurture is limited to the pecuniary value of the services the deceased parent would have provided and cannot include damages for the emotional loss of growing up without a father." *Id.*

Rolf Howard continued to live at home after his graduation from high school in 1989. He had a close relationship with his father. They discussed Rolf's educational plans and Howard gave moral direction to his son. Although he lived at home, Rolf Howard had a part-time grocery clerk position beginning in April 1990. In the summers he worked full-time and in the school year he worked about 20 hours a week. He enrolled in junior college beginning in the fall of 1990 and is still in college.

Because Rolf Howard was living at home and had such a close relationship to his father, the court considers that he was still a dependent child until age 21. Placing

a value on the career and other guidance provided by Howard to his son is difficult. It must be remembered that the court is not placing a value on the relationship or on the sorrow Rolf Howard has experienced. The [*21] court considers that Rolf Howard was becoming independent as demonstrated by his part time work and that most of the guidance that could be provided by a father to a son had been provided by Howard during the years of Rolf's upbringing. The court awards a total of $5,000 in lost nurture for the period from the death of Kenneth Howard to Rolf Howard's twenty-first birthday.

8. Vika Howard's Wage Loss and Medical Expenses

Plaintiffs seek an award for wages lost and medical expenses incurred by Vika Howard as a result of her husband's death. Mrs. Howard testified that after Howard's death she was overwhelmed by her new responsibilities and emotionally upset. She lost work and sought psychological services. Plaintiffs argue that these losses and expenses are out-of-pocket pecuniary losses compensable under DOHSA. Defendant argues that the losses are not compensable because they are occasioned by grief, which clearly is not compensable, and because these losses do not reflect loss of funds or services from the decedent. The parties candidly admit to a paucity of case law on this issue.

The court holds that these losses are not recoverable under DOHSA. The losses fall into two categories: losses caused by grief and losses caused by the assumption of new responsibilities. As to the second category, the court already has compensated Vika Howard for the

loss of services previously provided by Kenneth Howard. For example, to the extent that she was required to attend to Selma Howard's affairs because of the death, she can be and is compensated for this additional time. To award her damages [*22] for Kenneth Howard's lost services and then additional damages when she decided to perform these services herself would be a form of double recovery. As to the first category, it is uncontested that grief and emotional suffering may not be recovered in a wrongful death action under DOHSA. Yet it would amount to such a recovery could plaintiffs recover the medical costs of diminishing their emotional suffering.

9. *Summary*

Under DOHSA, the court awards to Vika Howard the following: $79,275 in lost earnings; $23,000 in lost pension benefits; and $54,063 in lost services. The court awards $158,923 to the conservatorship of Selma Howard. The court awards $5,000 to Rolf Howard.

B. Survival Action

The estate of Kenneth Howard is entitled to reimbursement for funeral expenses, medical expenses, and pain and suffering. The court awards $8,221.42 in funeral expenses and $3,486.22 in medical expenses. To the extent that theses funds have already been paid by Vika Howard the estate shall reimburse her.

Pain and suffering is more difficult to quantify. It appears that Howard did not experience great pain at the

time of the injury. On the other hand, there is evidence in the medical records that the cast bothered him and caused discomfort. There is at least one notation in medical records that Howard was in pain from the injury. Exhibit 41. Moreover, Howard experienced a medical procedure in Mexico in less that optimal circumstances. [*23] On the night of his death, Howard was experiencing difficulty sleeping. He eventually lost awareness as the flow of blood to his lungs was constricted. He regained limited consciousness prior to his death. On the way to the hospital and upon arriving he complained of a dry mouth and difficult breathing. But he was not responsive to questioning. Vika Howard testified that when she found him in distress, sitting up in bed and staring at the wall, Howard made a silent request for help by lifting his arms up to her and then to his son. The poignancy of this gesture is enhanced because Kenneth Howard enjoyed life and was devoted to his family. The court finds that Howard had some awareness of his impending death and distress in the early morning hours of October 11, 1990. Given all of the above factors, the court awards $35,000 in pain and suffering.

The total survivor award is $46,707.

Prejudgment interest is awarded on all amounts for past damages (damages through the date of trial) at the rate provided for by 28 U.S.C. § 1961 and Local Rule 590. Prejudgment interest shall accrue on such amounts from the date of Kenneth Howard's death, October 11, 1990, to the date judgment was entered, September 17, 1992.

IV.

The clerk shall enter an amended judgment for plaintiffs in the amount of $366,968, plus prejudgment interest at the rate of 3.41% on damages sustained through the date of trial, amounting to $8,223, plus costs in the amount of $3,603, for a total of [*24] $378,794. Postjudgment interest shall accrue pursuant to 28 U.S.C. § 1961 from the date the original judgment was entered, September 17, 1992, at the rate then applicable.

IT IS SO ORDERED.

Dated: 10 February 1993

/s/David F. Levi
DAVID F. LEVI
United States District Judge

Supreme Court, U.S.
FILED
APR - 3 1995
OFFICE OF THE CLERK

No. 94-1571

In The

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as personal representative of the Estate of Kenneth J. Howard,

Petitioner,

vs.

CRYSTAL CRUISES, INC., a California corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a case to be decided under U.S. law, does the Death on the High Seas Act (46 U.S.C. App. § 761 *et seq.*) apply to a wrongful death action arising on the high seas within the territorial waters of a foreign state?

2. Is it a violation of the "collateral source" doctrine to consider the decedent husband's total household income in order to determine his rate of personal consumption and, in turn, the amount of his own income that he would have contributed to the support of his wife if he had lived?

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No. 94-1571

In The

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as personal representative of the Estate of Kenneth J. Howard,

Petitioner,

vs.

CRYSTAL CRUISES, INC.,[1]
a California corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

While the first question is one of law, it is not, as petitioner urges, whether DOHSA is a "general law of the forum" or whether it applies to cases arising other than on the "high seas" but whether the term "high seas" in DOHSA may include the territorial waters of foreign

[1] Crystal Cruises, Inc., is a wholly-owned subsidiary of Crystal Enterprises, Inc., which is a wholly-owned subsidiary of Nippon Yusen Kaisha K.K.

states. Courts have unanimously held that it may. The second question is one of fact only and not of law, as further discussed in Part IV below, and we therefore do not consider it at length in relation to possible conflict or the importance of its being settled by this Court.

II. NO CONFLICT WITH ANY OTHER COURT OF APPEALS OR WITH THIS COURT IS PRESENTED.

As to the first question, the only prior published decision by a U.S. Court of Appeals that speaks directly to this issue, *First & Merchants National Bank v. Adams*, 1981 A.M.C. 2592 (4th Cir. 1981), is in accord with the Ninth Circuit's decision in this case. Two other court of appeals decisions, *Sanchez v. Loffland Bros.*, 626 F.2d 1228 (5th Cir. 1980), and *Public Administrator of New York County v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir.), *cert. denied*, 443 U.S. 928 (1979), are less clearly on point but are also cited by the Ninth Circuit as being in accord, along with nine published decisions on the district court level and two leading authorities on maritime law. *See* Petitioner's Appendix at pp. 8-9.[2]

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[2] *Leano v. States Marine Lines*, 1970 A.M.C. 1694 (C.D. Cal. 1969), is sometimes cited as holding to the contrary, although it contains no discussion of the issue presented here. *Leano* involved a collision that occurred twenty-two miles inside the mouth of Manila Bay. Arguably an enclosed bay or harbor, like a river or inland lake lying wholly within a foreign state, is outside the scope of the term "high seas." That issue does not arise in this case, where the accident occurred in the open coastal waters of Mexico.

As to the second question, no conflict in respect of admiralty or other federal law is presented or could be presented. The calculation of personal consumption is a question of fact, and it was treated as such in this case by both the District Court and the Court of Appeals.

III. AS TO DOHSA, NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED THAT NEEDS TO BE SETTLED BY THIS COURT.

DOHSA was not applied in this case because it is thought to be a "general law of the forum" or because both plaintiff and defendant are Americans, as petitioner suggests, but because the decedent's death was found to have been "caused by wrongful act, neglect, or default occurring on the high seas. . . . " 46 U.S.C. App. § 761. The question presented is one of statutory construction, and the answer is not in doubt. The term "high seas" has long been regarded in U.S. maritime jurisprudence as extending to the coastal waters of foreign states up to the low-water mark. *E.g., Ross v. McIntyre*, 140 U.S. 453, 471 (1891); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 453 (1847); *United States v. Brailsford*, 18 U.S. (5 Wheat.) 184, 200-210 (1820). In *United States v. Rodgers*, 150 U.S. 249 (1893), Justice Field held that the Great Lakes, even within the territorial waters of Canada, fall within the meaning of the term "high seas." There is no authority for the proposition urged here by petitioner that the term "high seas" is limited to international waters.

Congress was certainly aware in 1920 when DOHSA was enacted that the term "high seas" had this broad meaning. The Congressional Record includes a letter

from an Assistant Attorney General of the United States in response to one congressman's request for a legal definition of this term as it might relate to DOHSA:

> "The high seas include the whole of the seas below high-water mark and outside the body of any county [sic]." (Bouvier's Law Dictionary.)
>
> "According to the English doctrine, the high sea begins at the distance of 3 miles from the coast of any country; according to the American view, at low-water mark, except in the case of small harbors and roadsteads within the *fauces terrae*." (Black's Law Dictionary.)
>
> The term "high seas" includes water on the seacoast without the boundaries of low-water mark. (See Ross v. McIntyre, 140 U.S. 453.) [52 Appendix to the Congressional Record 31, 34, 63rd Cong. 3rd Sess. (1914).]

The clear purpose of Congress in enacting DOHSA was to create a federal remedy for wrongful death "in cases where there is now no remedy." *Moragne v. United States Marine Lines*, 398 U.S. 375, 397 (1970), quoting 59 Cong. Rec. 4486. In 1886 this Court had held that no right of action for wrongful death existed under general maritime law. *The Harrisburg*, 119 U.S. 199 (1886). In cases like this one, where U.S. law applies, claimants were left with no remedy at all. DOHSA was enacted in 1920 to fill this gap. By its terms, DOHSA applies to all wrongful death actions arising "on the high seas" with the exception of the Great Lakes, the Panama Canal Zone, and the territorial waters of the States, where Congress deemed that local wrongful death statutes were sufficient. *Moragne*, 398 U.S. at 397-98.

Petitioner suggests here that Congress intended to repudiate *The Harrisburg* only in part, leaving an entire class of claimants, those whose actions arose in foreign territorial waters, still without a remedy. Nothing in DOHSA or its legislative history supports this proposition. Petitioner's citations to commentary on earlier and different versions of the Act which did not become law are irrelevant.

IV. THE CALCULATION OF PERSONAL CONSUMPTION IS A QUESTION OF FACT, NOT LAW.

The District Court determined decedent's rate of personal consumption by multiplying the total household income by 30%. The Court treated this as a question of fact only. Appendix at pp. 38-40. The Ninth Circuit also treated it as a question of fact:

> The appellant's own economic expert expressed the concept of "personal consumption" in terms of a percentage of total household income, and relied on a chart (the so-called "Cheit Table") which showed that the average head of household in a two-person/two income household consumes 30% of the total household income. [Appendix at pp. 10-11.]

Petitioner tried to show that her husband had been an exceptionally frugal man who consumed only 30% of his own personal income. However, the District Court found that the petitioner's allegations in this regard were unsupported by the evidence, Appendix at p. 39, and the Ninth Circuit found "no clear error" in this determination. *Id.* at p. 11.

Petitioner does not now contend that the District Court's calculation of the decedent's personal consumption was incorrect as a matter of fact. Instead, petitioner tries to characterize it as an error of law by invoking the "collateral source" doctrine. As the Ninth Circuit points out, petitioner cites no relevant legal authority in support of her position. *Id.* Indeed, her position makes no sense. The District Court was merely applying the findings of an empirical study, proffered by petitioner's own expert, to estimate the decedent's personal consumption and, in turn, the amount of support that the decedent might reasonably have been expected to contribute to his wife in the future had he lived. The District Court gave no consideration to new and collateral sources of income that might have become available to the petitioner in the future; rather, the Court based its determination of future support on what the decedent had in fact provided in the past.

CONCLUSION

The issues raised by Petitioner do not warrant hearing by this Court. There is no conflict among the circuits, or even among the district courts, with respect to the DOSHA question. The term "high seas" has long been understood by this Court, and was understood by Congress when DOHSA was enacted, as encompassing the territorial waters of foreign states. Further, the calculation of personal consumption is a factual issue. It does not present a legal issue at all, let alone one that merits consideration by this Court.

The Petition should be denied.

Respectfully submitted,

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